Supreme Court U.S.
FILED

No. 06A557

06-930 NOV 11 2006

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In The

Supreme Court of the United States

HAROON RASHID,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As a question of law, was legal permanent resident alien Petitioner's conviction of third degree misdemeanor assault an "aggravated felony" for the purpose of deportation under Section 237(a)(2)(A)(iii) of the Immigration and Naturalization Act, 8 U.S.C. § 1227(a)(2)(A)(iii).

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OPINION BELOW

The opinion of the Tenth Circuit of Appeals is reported as *Rashid v. Gonzales*, 190 Fed.Appx. 676, 2006 WL 2171522 (10th Cir. 2006).

STATEMENT OF JURISDICTION

A panel of the Tenth Circuit entered its decision denying a petition from a final deportation order of the Board of Immigration Appeals on August 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTES

8 United States Code section 1227(a)(2)(A)(iii) provides:

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 United States Code section 1101(a)(43)(F) provides:

> As used in this chapter ...[t]he term "aggravated felony" means ...a crime of violence (as defined in section 16 of Title 18 ...) for which the term of imprisonment at least one year ....

18 United States Code section 16 provides:

> The term "crime of violence" means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or

> property of another may be used in the course of committing the offense.

Colorado Revised Statutes section 18-3-204 provides:

> A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person .... Assault in the third degree is a class I misdemeanor ....

Colorado Revised Statutes section 18-1.3-501 provides:

> Class I [:] Minimum Sentence [-] Six months imprisonment, or five hundred dollars fine, or both[;] Maximum Sentence [-] Eighteen months imprisonment, or five thousand dollars fine, or both.

STATEMENT OF THE CASE

Petitioner, Haroon Rashid, is a native and citizen of Pakistan and was admitted into the United States in 1997 as a lawful permanent resident. He resides in Colorado with his American wife and American-born minor children.

On March 13, 2003, after being taunted because of his ethnic background, Mr. Rashid was involved in a physical altercation in which he and the other person received minor scrapes. Mr. Rashid was charged with a single count of misdemeanor third degree assault. Colorado Revised Statutes section 18-3-204. This was his first offense of any kind. Mr. Rashid was convicted of the charge on March 17, 2004. A sentence was imposed of 35 days in jail (401 days with 366 days suspended).

As a result of this misdemeanor conviction, on April 21, 2004, the Department of Homeland Security placed Mr. Rashid in removal proceedings charged as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A). On November 29, 2004, the Immigration Judge ordered the removal of Mr. Rashid.

Mr. Rashid filed a timely appeal to the Board of Immigration Appeals on December 2, 2004. See, 8 C.F.R. § 1003.3. The Board had jurisdiction of the underlying removal appeal pursuant to 8 C.F.R. § 1003.1. The Board issued its final decision dismissing the appeal on April 14, 2005. A timely petition was filed by Mr. Rashid in the Court of Appeals on May 12, 2005. See, 8 U.S.C. § 1252(b)(1).[1] On August 3, 2006, a panel of the Tenth Circuit entered judgment denying the petition for review from a final decision of the Board of Immigration Appeals. The petition for Writ of Certiorari was initially filed by mail with this Court on November 1, 2006.[2] The jurisdiction of this Court additionally rests on 28 U.S.C. § 1254(1).

ARGUMENT

Introduction to the Question Presented

When evaluating whether an offense is an aggravated felony, the Court presumptively applies the categorical approach established in *Taylor v. United States*, 494 U.S. 575, 602, 110 S.Ct. 2143 (1990). This approach prohibits consideration of evidence other than the statutory definition of the offense, thus not taking into account the particular facts underlying a conviction. *Leocal v. Ashcroft*, 543 U.S. 1, 11, 125 S.Ct. 277, 160 L.Ed.2d 271 (2004).

8 U.S.C. section 1227(a)(2)(A)(iii) provides: "Any alien who is convicted of an aggravated felony at any time after admission is

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[1] Although there is a jurisdictional bar to the review of a final order of removal, 8 U.S.C. § 1252(a)(2)(C), the Court of Appeals and this Court have jurisdiction to determine the applicability of the jurisdictional bar and whether the Petitioner's conviction was an "aggravated felony." *Alaka v. Attorney General*, 456 F.3d 88, 94-5 (3rd Cir. 2006); *Francis v. Reno*, 269 F.3d 162, 165 (3rd 2001); *Khalayeh v. I.N.S.*, 287 F.3d 978 (10th Cir. 2002).

[2] On November 7, 2006, the Court ordered the reformatting of the attachments to the petition for writ of certiorari and granted a 60-day extension of time from that day for the re-filing of this petition. A stay of deportation was issued by Justice Stephen G. Breyer on December 6, 2006, pursuant to Supreme Court Rule 23.

deportable.". An "aggravated felony" is defined at 8 U.S.C. section 1101(a)(43)(F):

> As used in this chapter ...[t]he term "aggravated felony" means ...a crime of violence (as defined in section 16 of Title 18 ...) for which the term of imprisonment at least one year ....

Thus, the definition has two requirements (1) a crime of violence as defined by 18 U.S.C. section 16, and (2) a term of imprisonment of at lease one year. The offense for which Mr. Rashid was convicted, third degree misdemeanor assault, has a maximum sentence of 18 months, although Mr. Rashid was sentenced to a term of actual imprisonment of only 35 days. Colorado Revised Statutes (C.R.S.) sections 18-1.3-501 and 18-3-204.

A "crime of violence" is then defined by 18 U.S.C. section 16 as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Tenth Circuit properly determined that the statutory language of Colorado's third degree assault statute does not necessarily include the use or threatened use of physical force and concluded, therefore, that it is not a crime of violence under § 16(a). *Rashid v. Gonzales*, 190 Fed.Appx. 676, 2006 WL 2171522, **2 (10th Cir. 2006); C.R.S. 18-3-204; *see also*,; *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196-7 (2nd Cir. 2003); *Francis v. Reno*, 269 F.3d 162, 171-2 (3rd Cir. 2001); *United States v. Villegas-Hernandez*, ____ F.3d. ____, 2006 WL 3072558 (5th Cir. 2006); *Sing v. Ashcroft*, 386 F.3d 1228, 1234 (9th Cir. 2004); and *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005).

The Tenth Circuit panel then considered § 16(b) and held that, as a matter of law, third degree misdemeanor assault met that section's requirements for an "aggravated felony." *Rashid*, 2006 WL 2171522, **3. Secti 6(b) also has two requirements. First, the offense must be a "fel , and, second, the offense must involve a substantial risk that physical force against a person or property may be used in the course of the offense. *Vellegas-Hernandez*, ____ F.3d ____, 2006 WL 3072558 (each requirement must be independently satisfied). The Circuit Court found that § 16(b) was ambiguous and looked beyond the statute to particular facts underlying the conviction to determine whether the offense of third degree assault involved a substantial risk of physical force. *Rashid*, 2006 WL 2171522, **2-3. It is there that the Circuit Court erred because it overlooked the first requirement and did not need to reach the second.

There Is a Conflict Among the Circuit Courts As to Whether A Misdemeanor Assault Is An Aggravated Felony

In its argument before the Immigration Judge and the Board of Immigration Appeals, the Respondent Government contended that the Colorado misdemeanor third degree assault offense by law constitutes a "felony" within the meaning of federal "crime of violence" definition under 18 U.S.C. § 16(b) because the misdemeanor offense is potentially punishable by more than one year. In order for the Board of Immigration Appeals and then the Tenth Circuit panel to reach the second requirement of § 16(b), they also had to agree with the Government's argument. Two previous Tenth Circuit decisions have also held that a misdemeanor offense that is punishable by more than one year is a "felony" for the purposes of the Immigration and Nationality Act (INA). *United States v. Rodriguez-Rojo*, 175 Fed. Appx. 982, 2006 WL 979303, **2 (10th Cir. 2006) (regarding a Texas offense) and *United States v. Saenz-Mendoza*, 287 F.3d 1101, 1103-4 (10th Cir. 2002) (regarding a Utah offense).

The Tenth Circuit's decisions follow opinions from other Circuits which have similarly held that misdemeanor offenses punishable by more than one year are felonies under the INA.

United States v. Pacheco, 225 F.3d 148, 154-55 (2nd Cir. 2000); *United States v. Graham*, 169 F.3d 787, 792 (3rd Cir. 1999); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *United States v. Urias-Escobar*, 281 F.3d 165, 167-68 (5th Cir. 2002); *United States v. Gonzales-Vela*, 276 F.3d 763, 767-68 (6th Cir. 2001); *Guerro-Perez v. INS*, 242 F.3d 727, 734-37 (7th Cir. 2001); *United States v. Gonzales-Tamariz*, 310 F.3d 1168, 1170-71 (9th Cir. 2002); and *United States v. Christopher*, 239 F.3d 1191, 1193-94 (11th Cir. 2001). However, these opinions almost uniformly relied upon the preliminary provision, 8 U.S.C. § 1101(a)(43), and failed to make the detailed analysis of 18 U.S.C. § 16(a) and (b) as expressly directed by § 1101(a)(43).

In direct contrast to these decisions, where the language of § 16(b) has been compared with that found in § 16(a), Circuit courts have ruled that Congress meant what it said - that misdemeanor convictions may be felonies under § 16(a) if they possess the required element, but are categorically excluded from the definition of an aggravated felony under § 16(b). *Sing v. Gonzales*, 432 F.3d 533, 538 (3rd 2006); *Francis*, 269 F.3d at 168-69 (3rd Cir); *Villegas-Hernandez*, ___ F.3d ___, 2006 WL 3072558 (5th Cir.); *Flores v. Ashcroft*, 350 F.3d 666, 669 (7th Cir. 2003); *Singh*, 386 F.3d at 1231, n. 3 (9th Cir); *see also*, *United States v. Ponce-Casalez*, 212 F.Supp.2d 42, 44-46 (D.R.I. 2002); *United States v. Villanueva-Gaxiola*, 119 F.Supp.2d 1185, 1190 (D.Kan. 2000).

As the Third Circuit stated in *Francis*:

> ...Congress did not use the term "felony" in § 16(a). Rather, § 16(a) is narrowly drawn to include only those crimes whose elements require the "use, attempted use, or threatened use of physical force." Although § 16(b) is specifically limited to felonies, it does not include all felonies. It is limited to those felonies that "by [their] nature involve[s] a substantial risk that ...force ...may be used." Clearly, Congress intended to include felonies and misdemeanors under subsection (a), but only intended certain felonies to be included under subsection (b)."

Francis, 269 F.3d at 168.

The *Francis* Court then recognized the discussion in the Senate Report for the Comprehensive Crime Control Act of 1984 that makes this clear:

> ...The term "crime of violence" is defined, for purposes of all Title 18 U.S.C. in Section 1001 of the Bill... The term means an offense - *either a felony or a misdemeanor* - that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or any felony* that, by its nature, involves the substantial risk that physical force against person or property may be used in the course of its commission. S.Rep. No. 225 (1983).

Francis, 269 F.3d at 169 (emphasis in opinion). The Court also notes the purpose in recognizing the state categorization of the offense as a misdemeanor or felony:

> Thus, by relying upon state law to provide the categorization, we eliminate the redundancy that would otherwise result from including both a maximum of one year imprisonment under § 1101(a)(43)(F) and the condition precedent of "felony" in § 16(b) that is expressly incorporated in § 1101(a)(43)(F).

Francis, 269 F.3d at 170.

This interpretation is consistent with the rule of lenity embodied in the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290, 150 L.Ed.2d 347 (2001); *Francis*, 269 F.3d at 170.

> We resolve the doubts in favor of that construction because deportation is a drastic measure

> and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948).[3]

CONCLUSION

This is an issue of law arising out of the undue reliance of certain circuits upon the language of 8 U.S.C. § 1101(a)(43)(F) without engaging in a proper analysis of 18 U.S.C. §16. As discussed above, the decision of the Tenth Circuit below, as well as decisions of other Circuits, are in direct conflict those Circuits which have conducted a proper analysis and have reached the rule that 18 U.S.C. § 16(b) categorically excludes state misdemeanors from the definition of "aggravated felony."

For these reasons, the Petitioner respectfully requests this Court accept the Writ and resolve this important and recurring matter.

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[3] Following the initial filing of this petition, on December 5, 2006, the Court issued its opinion in *Lopez v. Gonzales*, 549 U.S _____, 127 S.Ct. 625 (2006), in which it affirmed a strict and narrow application of the definition of "aggravated felony" and noted the overreaching of the Government in extending the definition to misdemeanor offenses in deportation proceedings.

Wherefore, Petitioner, Haroon Rashid, respectfully submits his Writ of Certiorari this 2nd day of January, 2007.

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APPENDIX

Rashid v. Gonzales, 2006 WL 2171522 (10th Cir. 2006) (reformatted)

In re Haroon Rashid, No. A46 188 443, Board of Immigration Appeals (April 14, 2005) (reformatted)

In the Matter of Haroon Rashid, No. A46 188 443, Order of the Immigration Judge (November 29, 2004) (reformatted)

In the Matter of Haroon Rashid, No. A46 188 443, Oral Decision and Order of the Immigration Judge (November 29, 2004) (reformatted)

190 Fed.Appx. 676, 2006 WL 2171522 (C.A.10)

United States Court of Appeals,
Tenth Circuit

Haroon RASHID, Petitioner,
v.
Alberto R. GONZALES, United States Attorney General, Respondent.

No. 05-9535.

Aug. 3, 2006.

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Before KELLY, BRISCOE, and LUCERO, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

PER CURIAM.
***1** Petitioner Haroon Rashid, a lawful permanent resident of the United States and a native and citizen of Pakistan, was placed in removal proceedings based on his conviction in a Colorado state court for third degree assault. Respondent asserted that this conviction was a "crime of violence," as defined by 18 U.S.C. § 16, which subjected Mr. Rashid to removal under 8 U.S.C. §§

1227(a)(2)(A)(iii) and 1101(a)(43)(F). An Immigration Judge (IJ) determined that the third degree assault conviction was not a crime of violence, and terminated the removal proceedings. Respondent appealed. The Board of Immigration Appeals (BIA) reversed and remanded to the IJ for the ministerial purpose of receiving into the record various documents pertaining to the assault conviction. The IJ then supplemented the record and ordered Mr. Rashid removed to Pakistan, pursuant to the BIA's order. In a subsequent appeal to the BIA, the BIA ordered Mr. Rashid deported.[FN1] Mr. Rashid filed a timely petition for review by this court. The BIA denied Mr. Rashid's subsequent motion to reconsider.

FN1. The BIA characterized the IJ's decision as ordering Mr. Rashid removed based on his third degree assault conviction. This is inaccurate, given the IJ's original order terminating the removal proceedings. In his order after the first remand, the IJ ordered Mr. Rashid removed because the BIA directed him to.

We have jurisdiction to determine if Mr. Rashid is removable "by reason of a criminal offense listed in [§ 1227]." *Tapia Garcia v. INS*, 237 F.3d 1216, 1220 (10th Cir.2001). We deny the petition for review.

Scope and Standard of Review

Respondent bears the burden in removal proceedings to prove by clear and convincing**678* evidence that the alien is subject to removal. 8 U.S.C. § 1229a(c)(3)(A); *Schroeck v. Gonzales*, 429 F.3d 947, 952 (10th Cir.2005). Because the BIA did not adopt any reasoning of the IJ, we review only the BIA's orders. *Krastev v. INS*, 292 F.3d 1268, 1275 (10th Cir.2002). In doing so, we review de novo the BIA's determinations of questions of law. *Fernandez-Vargas v. Gonzales*, 394 F.3d 881, 884 (10th Cir.2005), *aff'd* --- U.S. ----, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006). We are not, however, "at liberty to search for grounds to affirm that were not relied upon by the agency." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1205 (10th Cir.2006).

Statutory Framework

The issue is whether Mr. Rashid is removable based on his

conviction for third degree assault, in violation of Colo.Rev.Stat. § 18-3-204. Under 8 U.S.C. § 1227(a)(2)(A)(iii), an alien is subject to removal if he was convicted of an aggravated felony. In turn, 8 U.S.C. § 1101(a)(43)(F) includes in the definitions of "aggravated felony" the term "crime of violence," as defined in 18 U.S.C. § 16. Accordingly, we must evaluate the BIA's determination that Mr. Rashid's Colorado third degree assault conviction was a "crime of violence" under § 16.

The term "crime of violence" means-

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

**2 18 U.S.C. § 16.

The third degree assault statute provides:

A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon.

Colo.Rev.Stat. § 18-3-204.[FN2]

FN2. Pursuant to the statute, this crime is a class 1 misdemeanor, but because Mr. Rashid was sentenced to 401 days' incarceration, *see* R. at 65, the BIA characterized the conviction as a felony under federal law. Mr. Rashid does not challenge this ruling.

Categorical Approach

When evaluating a conviction under § 16, "we are to use the 'categorical approach,' under which a court must only look to the statutory definition, not the underlying circumstances of the crime." *United States v. Lucio-Lucio*, 347 F.3d 1202, 1204 (10th Cir.2003)

(quotation omitted). If we determine, however, that § 16 is ambiguous, or broad enough to encompass a spectrum of crimes, some of which would and some of which would not constitute a "crime of violence," we can look beyond the statute to certain records of the prior proceeding to determine whether the jury was actually required to make findings relevant to our analysis. *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). More specifically, we may look at "the charging paper and jury instructions" to determine whether they "actually required the jury to find all the elements of [the crime] in order to convict the defendant." *Id.*; *see Shepard v. United States*, 544 U.S. 13, 23, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

Analysis

We first consider whether the third degree assault conviction was a crime of ***679** violence under § 16(a) ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). This court has determined that "the statutory language of Colorado's third degree assault statute does not necessarily include the use or threatened use of 'physical force.' " *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir.2005). In *Perez-Vargas*, we evaluated the Colorado statute in the context of the federal sentencing guidelines, specifically U.S.S.G. § 2L1.2.[FN3] *Id.* at 1287. The sentencing guideline at issue in *Perez-Vargas*, § 2L1.2, is almost identical to 18 U.S.C. § 16(a). *Id.* at 1286 n. 3; *accord United States v. Torres-Ruiz*, 387 F.3d 1179, 1187 (10th Cir.2004) (stating "2L1.2 defines the phrase 'aggravated felony' by effectively incorporating the definition of 'crime of violence' found in 18 U.S.C. § 16"). "A prior conviction for third degree assault in Colorado ··· is not categorically a crime of violence under USSG § 2L1.2." *Perez-Vargas*, 414 F.3d at 1287. Accordingly, we conclude that Mr. Rashid's conviction for third degree assault is not categorically a crime of violence under § 16(a).

FN3. "Crime of violence" includes "any offense under federal, state or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, Application Note 1(B)(iii).

We next turn to the question of whether Mr. Rashid's prior conviction is categorically a crime of violence under § 16(b) ("any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). Section 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

***3* In the criminal-sentencing context, this court has held that "a Colorado third degree assault is categorically a crime of violence under U.S.S.G. § 4B1.2(a)." *United States v. Krejcarek*, 453 F.3d 1290 (10th Cir.2006) (citing *United States v. Paxton*, 422 F.3d 1203, 1207 (10th Cir.2005)).[FN4] But we have not held that third degree assault categorically is a crime of violence under § 16(b). There is a "significant difference" between § 4B1.2's requirement of a "risk of physical injury," and § 16(b)'s requirement of a "risk of use of force." *United States v. Moore*, 420 F.3d 1218, 1224 (10th Cir.2005). "Without a distinction between crimes that potentially involve violent conduct and crimes that merely involve the possibility of resulting harm, the § 16(b) definition would be far too inclusive...." *Lucio-Lucio*, 347 F.3d at 1206; *see also id.* at 1207 (noting and preserving distinction between § 16(b) and § 4B1.2(a)(2), which is "obviously broader than § 16(b)"; limiting holding to cases not involving actual injury to others). Accordingly, the actual conduct that is criminalized must be considered when applying § 16(b).

FN4. "Crime of violence" refers to an offense that "(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another." U.S.S.G. § 4B1.2(a).

Looking beyond the statute of conviction, the BIA reasoned, and we agree, that "jury instructions 8 through 12 reflect that [Mr. Rashid] offered a self-defense theory at trial, and two of those instructions discuss the use of physical force." ***680** *In re Rashid*, No. A46 188 443, 2005 WL 3802089 (BIA Dec. 1, 2005) (unpublished). In particular, Instruction No. 9 stated:

It is an affirmative defense to the crime of assault in the third degree that the defendant used physical force upon another person:

1. in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by the victim, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose.

However, the defendant was not justified in using physical force if:

1. with intent to cause bodily injury to another person, he provoke[d] the use of unlawful physical force by that other person, or

2. he [was] the initial aggressor, except that his use of physical force upon another person under the circumstances [was] justifiable if he [withdrew] from the encounter and effectively communicate[d] to the other person his intent to do so, but the latter nevertheless continue[d] or threaten[ed] the use of unlawful physical force, or

3. the physical force involved [was] the product of a combat by agreement not specifically authorized by law.

R. at 148.

By returning a guilty verdict to the charge of third degree assault, the jury, which we presume followed the jury instructions, necessarily rejected Mr. Rashid's affirmative defense that he used physical force against the victim to defend himself. In doing so, the jury necessarily had to find that Rashid "was not justified in using physical force" for one of the three reasons outlined in the instruction quoted above. We conclude that any of these three reasons would be sufficient to satisfy the requirements of § 16(b), i.e., all three indicate that the crime/situation involved a substantial risk that Rashid would use, or did in fact use, physical force against the victim.

Conclusion

***4* We conclude that Mr. Rashid's prior conviction under the Colorado third degree assault statute was a crime of violence, as defined in 18 U.S.C. § 16. Consequently, his removal is warranted pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1101(a)(43)(F). The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A46 188 433 – Aurora Date: April 14, 2005

In re: HAROON RASHID

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patrick C. Hyde, Esquire

ON BEHALF OF DHS: Donald C. O'Hare
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony as defined in section 101(a)(43)(F), I&N Act [8 U.S.C. § 1101(a)(43)(F)]

APPLICATION: Termination of Removal Proceedings

ORDER:

PER CURIAM. We affirm the Immigration Judge's November 29, 2004, decision ordering the respondent removed from the United States as an alien convicted of an aggravated felony on the basis of his March 2004 Colorado conviction for the offense of third-degree assault. The seventh jury instruction submitted in connection with the respondent's prosecution, entered into the administrative record as part of Group Exh. 2, reflects that the respondent was charged with (and convicted of) causing injury to

another by means of knowing or reckless conduct, and not negligent conduct. As the Colorado courts have held, the elements of assault are "'an unlawful attempt coupled with a present ability to commit a *violent* injury on the person of another.'" *People v. Cardwell*, 510 P.2d 317, 322 (Colo. 1973) (emphasis added) (quoting *Haas v. People*, 394 P.2d 845 (Colo. 1964)). For the reasons stated in our decision of November 8, 2004, we conclude that this offense qualifies as a crime of violence under either subsection of 18 U.S.C. § 16. The respondent presents no argument on appeal that would cause us to reconsider this determination. Accordingly, the appeal is dismissed.

s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
AURORA, COLORADO

FILE: A 46 188 443

IN THE MATTER OF:	)	
	)	
HAROON RASHID	)	IN REMOVAL PROCEEDINGS
	)	
RESPONDENT	)	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 11-29-04. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the oral decision will be transcribed and will become the official decision in this case.

X The respondent was order removed to PAKISTAN.

The respondent's application for voluntary departure was granted until _____ with an alternate order of removal to _____, or in the alternative to _____. A bond of $_____ is required to be posted within five business days.

Voluntary departure will be under safeguards of the Department of Homeland Security.

The respondent's application for voluntary departure was denied and he/she was ordered removed to _____, or in the alternative to _____.

Respondent's application for _____ was:

granted.
denied.
withdrawn.
pretermittted.
other _____

Other _____.

11-29-04 s/ J P Vandello
(Date) J.P. Vandello
Immigration Judge

Appeal waived.
X Appeal reserved by Resp.. Appeal deadline is 12-29-04.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Aurora, Colorado

FILE: A 46 188 443 November 29, 2004

In the Matter of)
HAROON RASHID) IN REMOVAL PROCEEDINGS
Respondent)

ORAL DECISION AND
ORDER OF THE IMMIGRATION JUDGE

The facts of this case are borne out in the Oral Decision which was issued on a previous date. The Board of Immigration Appeals reviewed that decision and overruled it, finding that the respondent was in fact convicted of an aggravated felony; that assault in the third degree under Colorado statutes is a crime of violence, and since a one-year sentence was imposed, it is considered an aggravated felony under the definition section of 101(a)(43) of the Act.

The Board remanded the case so that the conviction document could be put in the record. It is now in the record as Exhibit

2.

IT IS ORDERED that the respondent be removed to Pakistan.

s/ J P Vandello
JAMES P. VANDELLO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JAMES P. VANDELLO, in the matter of:

HAROON RASHID
A 46 188 443
Aurora, Colorado

is an accurate, verbatim, transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for this file of the Executive Office for Immigration Review.

/s Susanne Trimmer

Susanne Trimmer, Transcriber

[filed 2005 FEB – 3 PM 2:32]

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

January 3, 2005
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.